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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IMMUNO, A.G.,

Petitioner,

vs.

DR. JAN MOOR-JANKOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF RESPONDENT DR. JAN MOOR-JANKOWSKI IN OPPOSITION TO IMMUNO A.G.'S PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, when considering if a letter to the editor on a matter of public concern is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), a substantial federal question is presented by the determinations of a state court, in a state common law libel action, that the letter does *not* contain any express or implied false defamatory statement of fact?

2. Whether under *Michigan v. Long*, 463 U.S. 1032 (1983), this Court has jurisdiction to review a state court decision dismissing a state common law action for libel, when the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent state constitutional or common law grounds?

COUNTER-STATEMENT OF THE PARTIES TO THE PROCEEDING

Petitioner Immuno Aktiengesellschaft für Chemisch-Medizinisch Produkte ("Immuno A.G.") is a commercial corporation organized and existing under the laws of Austria, having its principal office in Vienna, Austria, and having affiliated companies in approximately 30 different countries. Immuno A.G. manufactures, for commercial sale, biologic products derived from human blood. (Pet. App. 2, 60)[1]

Respondent Dr. Jan Moor-Jankowski is a professor of medical research at the New York University Medical School, the Director of the New York University Medical School's Laboratory for Experimental Medicine and Surgery in Primates ("LEMSIP"), the Director of the World Health Organization Collaborating

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[1] Immuno A.G.'s description of itself (Pet. i, 4) makes certain claims about its AIDS research that are not found in the record below, that are not otherwise known by respondent and that, to respondent's knowledge, have not been published in refereed scientific literature.

Center for Hematology of Primate Animals and the unpaid editor-in-chief of the *Journal of Medical Primatology*. (Pet. App. 2, 60) Dr. Moor-Jankowski (M.D., Berne University, Switzerland) is, as noted by the New York Appellate Division, a "universally acknowledged authority on the use of primates in biomedical research" (Pet. App. 60) and, specifically, is the recipient of the Geneva University "Prix Arthur de Claparde," a citation and medal from the Soviet Academy of Medical Sciences, the Trumpeldor Medal from the Prime Minister's Office of the State of Israel, the G. Bude Medal of the College de France in Paris and the French National Order of Merit for his scientific achievements and his Resistance activities during World War II. (Resp. App. 3-7)[2]

[2] Immuno A.G.'s contrived statement of the parties mischaracterizes Dr. Moor-Jankowski as a businessman-competitor of Immuno A.G. and ignores Dr. Moor-Jankowski's full-time university position and the fact that the laboratory directed by him, LEMSIP, is an integral part of the New York University Medical Center, a not-for-profit educational institution.

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COUNTER-STATEMENT ON JURISDICTION

Immuno A.G. fails to raise a substantial federal question as required under 28 U.S.C. § 1257 in its arguments attacking the determinations of the New York Court of Appeals that the Letter to the Editor in this case does not contain any express or implied false defamatory fact, and therefore is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); and this Court lacks jurisdiction under Article III because the New York Court of Appeals expressly decided the case on a bona fide separate, independent and adequate state constitutional ground, *see Michigan v. Long*, 463 U.S. 1032 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the United States Constitution, the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 1257(a), Section 8 of Article I of the New York State Constitution, and Section 3212 of the New York Civil Practice Law and Rules ("CPLR") are set forth in pertinent part in Respondent's Appendix. (Resp. App. 1)

COUNTER-STATEMENT OF THE CASE

I. *The Facts.*

Immuno A.G.'s petition, avoiding quotation of the Editorial Note and the Letter to the Editor here involved, brazenly distorts the Letter and misstates the pre-publication facts contrary to the determinations of the New York Appellate Division and Court of Appeals after their careful review of the record. *See* Supreme Court Rules 15.1.[3]

Dr. McGreal's Letter to the Editor and a prefatory Editorial Note by Dr. Moor-Jankowski were published in the December 1983 edition of the *Journal of Medical Primatology*.[4] In view of the

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[3] *See* pp. 17-22, *infra*.

[4] Immuno A.G.'s petition fails to acknowledge that the author of the Letter to the Editor, Shirley McGreal, is respected by prominent scientists and U.S. Government officials. (*See* Resp. App. 8-9)

importance of the complete texts of these documents in considering "general tenor" as a matter of federal law (*Milkovich v. Lorain Journal Co.*, 497 U.S. at ____, 110 S.Ct. at 2707), and "the content of the whole communication" as a matter of state law (Pet. App. 17), the entire texts are here presented.

The Editorial Note states: _

> In January 1983, the Editors of the *Journal of Medical Primatology* received a letter from Dr. Shirley McGreal, Chairwoman of the International Primate Protection League, alerting the biomedical community to a new attempt to establish another chimpanzee research laboratory in Africa. This was seen by Dr. McGreal as a violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research, and as a way to avoid the Convention on International Trade in Endangered Species (CITES).
>
> The Editors submitted Dr. McGreal's letter for "comments or reply" to IMMUNO A.G. in Vienna, Austria which had been mentioned as the company interested in establishing the laboratory. IMMUNO acknowledged the receipt of the letter on February 17, 1983, but provided no comments, referring the matter to their lawyers in New York. The lawyers requested that the *Journal of Medical Primatology* provide them with the documents on which Dr. McGreal's accusations were based; they termed the statements to be wholly inaccurate and reckless. They further stated (March 3rd, 1983, letter from Goldschmidt, Fredericks & Oshatz, New York): "We would also like to advise you that our review of Dr. McGreal's letter indicates that it is not a fair comment regarding our client's activities, and should you proceed with publication, without giving us the opportunity for a meaningful response, we shall be compelled to take whatever actions we deem necessary to redress our client's rights."
>
> The Editors advised the law firm that Dr. Shirley McGreal should be contacted directly for access to the original documents, and they extended the period for receiving the

rebuttal to April 20, 1983. During that period no additional information was received from IMMUNO or from their lawyers, but in the meantime, the matter was discussed in the Austrian press, and Dr. McGreal feels that these newspaper articles confirmed the contents of her letter. The final text of Dr. Shirley McGreal's letter of March 23, 1983, reflects the discussion in the Austrian press which occurred after her initial letter of January 30th was submitted for publication and this final letter is printed below.

(Pet. App. 149-150)

Dr. McGreal's Letter to the Editor was entitled "A Project With Potential to Spread Non-A Non-B Hepatitis in West Africa." It states:

The International Primate Protection League has learned with concern of proposals submitted by the Immuno A.G. Company of Austria to the Government of Sierra Leone, West Africa, regarding the company's plans to establish a chimpanzee research facility in Sierra Leone, West Africa.

According to a statement dated August 23 1982, submitted to the Government of Sierra Leone by Klaus Bieber, Austrian Consul in Sierra Leone, the animals would be used in hepatitis non-A, non-B research and testing of hepatitis B vaccine. The purpose of establishing the facility in Africa was stated to be "to avoid the problems involved with the importation of live chimpanzees." Presumably, these "problems" include national and international laws and treaties regarding the movement of live animals belonging to endangered species. The chimpanzee *Pan troglodytes* is listed in Appendix I of the Convention of International Trade in Endangered Species.

Besides getting round restrictions on the international movement of chimpanzees, cheapness of wild-caught chimpanzees appears to be a motivating factor for the Immuno

Company. According to the Austrian newspaper *Presse* (February 3, 1983), Immuno official Johann Eibl stated that captive breeding of chimpanzees was not an economically viable proposition.

The proposed facility would procure 60-80 chimpanzees per year, to be obtained from the wild. However, according to Bieber's statement, "it must be emphasized that the research will not bring about a decimation of chimpanzees: on the contrary, their numbers would remain stable." Readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised at this statement. However, Bieber cheerfully explains the nondetriment theme by saying: "Because after going through a research circle of about 3 years, the animals will be in perfect condition and ready for rehabilitation into the wild."

The International Primate Protection League is concerned over Immuno's plans on many grounds; to cite just a few of them:

1. Release of chimpanzee "veterans" of hepatitis non-A, non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease. Should release of carrier animals occur, hepatitis could well spread among wild chimpanzees over large parts of Africa. Thus chimpanzees could well become a reservoir for hepatitis just as bats are a reservoir for rabies. The result might be increased human persecution of chimpanzees.

2. Although chimpanzee rehabilitation has acquired a certain "chic," it is known that wild chimpanzees attack introduced newcomers. For this reason, chimpanzees in the Mount Asserik project in Senegal directed by Stella Brewer had to be recaptured and released on islands in the river Gambia with no resident chimpanzees. As yet, no permanent home has been located for these animals. The rehabilitation procedures take many years per animal and

are extremely costly and hence not feasible on the scale that would be required to start 60-80 animals per year on rehabilitation. Assuming a 5-year training per animal, there could be up to 400 animals undergoing rehabilitation at any given time, at the cost of millions of dollars annually. It is questionable whether, in spite of the most dedicated efforts, any rehabilitated chimpanzees will become totally normal, since they are usually removed from the wild at 1-2 years of age and thus miss the most critical years of their social development.

3. Capture of wild chimpanzees for research is in clear violation of the World Health Organization's 1982 statement on the procurement of primates for biomedical research. Chimpanzees are listed in the Red Data Book of the International Union for the Conversation of Nature as vulnerable. The WHO statement "strongly recommends" that

> endangered, vulnerable, and rare species be considered for use in biomedical research projects only if they are obtained from *existing* [emphasis added] self-sustaining captive breeding colonies (*i.e.*, captive-breeding all animals required to at least the F-2 generation).

4. Currently, there are over 1,000 chimpanzees in US laboratories, as well as large numbers in the Netherlands, Poland, Liberia, etc. These animals should be enough to supply any legitimate requirements for chimpanzees.

The International Primate Protection League shares the scientific community's concern over hepatitis. However, we feel that a way can and must be found to solve this problem without recourse to the dwindling populations of wild chimpanzees. Therefore, we appreciate the opportunity to draw this situation to the attention of interested parties.

Shirley McGreal, M.D.
Chairwoman
International Primate
Protection League
P.O. Drawer X
Summerville, SC 29483

(Pet. App. 150-152)[5]

II. *The Proceedings.*

On December 14, 1984, Immuno A.G. served its complaint alleging libel and *prima facie* tort against Dr. Moor-Jankowski (and others no longer in this case) complaining about the McGreal Letter and an article in the *New Scientist*. After extensive discovery, Dr. Moor-Jankowski moved for summary judgment. In an opinion dated August 6, 1987, the motion court granted the motion as to the *prima facie* tort claim but denied it as to the libel claim.

The Appellate Division reversed in an opinion and order dated January 17, 1989. (Pet. App. 59-88) "After a thorough review" of the record, the Appellate Division concluded "that the statements contained in the [McGreal] letter and *New Scientist* article are not actionable and that the defendant [Dr. Moor-Jankowski] is entitled to summary judgment dismissing the complaint." (Pet. App. 64-65) The Appellate Division reasoned that the Letter's:

> . . . ultimate objective was to express certain opinions which, while highly critical of plaintiff's proposal, did not rise to the level of outright accusations of wrongdoing. It was, moreover, the case that the factual assertions upon which McGreal's opinions rested were evidently true . . .

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[5] A couple of months after the publication of Dr. McGreal's Letter, Dr. Alfred Prince, the Director of Virus Research at the New York Blood Center and the discoverer of hepatitis non-A/non-B, wrote a letter to the editor of the *Journal of Medical Primatology* concerning Immuno A.G.'s proposed Sierra Leone project. Dr. Prince called the Immuno A.G. plan "unrealistic" in proposing to take 60 to 80 animals annually from the wild, because wild chimpanzee populations were dwindling and capture of chimpanzee infants inevitably resulted in death of chimpanzee mothers, and in proposing to return to the wild the chimpanzees used in hepatitis non-A/non-B research. Like Dr. McGreal, Dr. Prince recommended use of captive or captive-bred chimpanzees for research. (Pet. App. 153-154) Dr. Andrew Rowan, Assistant Dean of Tufts University School of Veterinary Medicine, also wrote a letter to the editor agreeing with Dr. Prince's statement of concerns and commenting further that establishing a laboratory in a country where chimpanzees are naturally found "as a ploy to avoid the barriers against trade in endangered species is not . . . . . ethical or responsible . . ." (Resp. App. 10)

(Pet. App. 65) Based on a lengthy analysis, the Appellate Division held that the statements contained in the McGreal Letter were either constitutionally protected opinion or were factual statements as to which Immuno A.G. had failed to come forward with evidence to satisfy the constitutionally imposed burden of proving falsity (Pet. App. 65-88), and indeed, that the record showed in most instances to be "demonstrably true!" (Pet. App. 88; exclamation in original) The Appellate Division also held that certain complained of statements in the *New Scientist* attributed to Dr. Moor-Jankowski, particularly that Immuno A.G.'s proposal was "scientific imperialism", were constitutionally protected opinion. (Pet. App. 87)

The New York Court of Appeals, in an opinion by Judge Judith Kaye and order dated December 14, 1989, unanimously affirmed summary judgment, holding that the publications at issue were protected under both the Federal and State Constitutions and thus not properly the subject of a libel suit. (Pet. App. 35-44) The Court specifically held that "the Appellate Division's extensive analysis of the record amply established that [Immuno A.G.] raised no triable issues of fact as to the falsity of the threshold assertions of [the Letter to the Editor]" (Pet. App. 42), and pointed to this case as an example of the "chilling effect" of libel litigation on free speech, remarking: "That chilling effect can be especially severe for scholarly journals, such as [Dr. Moor-Jankowski's]. ..." (Pet. App. 43-44). In the view of the Court of Appeals, "hypertechnical parsing of possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise, which is to assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved." (Pet. App. 44).

Immuno A.G. moved to reargue, principally complaining that the Court of Appeals had erred in finding that "plaintiff's allegations of a deliberate effort, or conspiracy, to smear its reputation are entirely conclusory, and therefore do not preclude summary judgment in defendant's favor." (Pet App. 43) By order dated February 15, 1990, the Court of Appeals denied that motion. (Pet. App. 90; *see also* Pet. App. 99)

Subsequently, this Court granted certiorari in *Milkovich* to review the grant of summary judgment by the Ohio state court dismissing a libel action by a high school wrestling coach against a newspaper and its columnist on the ground that complained of statements were constitutionally protected opinion. This Court reversed in an opinion by Chief Justice Rehnquist. Stating that under the First Amendment there was not a wholesale exemption for anything that might be labelled "opinion", Chief Justice Rehnquist held that the "dispositive question" was whether "a reasonable factfinder could conclude that the statements in the [complained of] column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." (497 U.S. at ____, 110 S.Ct. at 2707) Answering in the affirmative, Chief Justice Rehnquist reasoned (1) that as the Ohio Supreme Court itself had observed, the clear impact of the language was an accusation that Milkovich had committed perjury; (2) that loose, figurative, or hyperbolic language was not used; (3) that the "general tenor" of the article did not negate the impression of a charge of perjury; and (4) that the charge of perjury was sufficiently factual to be susceptible of being proved true or false. (*Ibid.*)

Shortly after *Milkovich* was decided, this Court granted Immuno A.G.'s then pending petition for certiorari, vacated the initial order of the New York Court of Appeals affirming summary judgment dismissing the complaint, and remanded this case back to the New York Court of Appeals "for further consideration in light of *Milkovich*". (Pet. App. 92-93)

On remand, the seven judges of the New York Court of Appeals *unanimously* re-entered the Appellate Division's grant of summary judgment, dismissing Immuno A.G.'s complaint. Their reasoning was stated in Judge Kaye's majority opinion for four judges and in three concurring opinions. We are confident that a review of the four opinions in the Court of Appeals (Pet. App. 1-33) will lead this Court to reject Immuno A.G.'s outlandish charges against the New York Court of Appeals. The four opinions are here highlighted:

1. The majority opinion is expressly based "on independent state constitutional grounds as well as federal review directed by the

Supreme Court." (Pet. App. 2) After summarizing the record in Part I of the opinion, the majority concluded (a) in Part II, that summary judgment is proper under *Milkovich* because Immuno A.G. had raised no triable issue of falsity (Pet. App. 4-11); and (b) in Part III, after an examination of the full publishing and political context of the Letter to the Editor and a statement of concern about the chilling effect of libel litigation on free expression, that summary judgment dismissing the libel complaint was proper "independently as a matter of state law." (Pet. App. 16-20)

2. Judge Simons concurred, agreeing that summary judgment was properly awarded on federal grounds under *Milkovich*, but concluded that "the majority has rendered an interpretation of *Milkovich* which is narrower than necessary to resolve the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended" (Pet. App. 21). He suggested that *Milkovich* arguably "did not change the law of defamation as it was previously applied by State and lower Federal Courts." (Pet. App. 22) Opposing as a matter of his judicial philosophy a decision on dual state and federal grounds, he explained: "The Supreme Court will not review the matter because it can no longer control the litigation; its decision would constitute merely an advisory opinion." (Pet. App. 25)

3. Judge Hancock also agreed with the majority that summary judgment was properly granted on federal grounds under *Milkovich*, but agreed with Judge Simons (a) that under *Milkovich* "context continues as a factor of undiminished significance", and (b) that the Court of Appeals should not proceed further to decide the case on state grounds. (Pet. App. 32-33) Unlike Judge Simons, Judge Hancock stated there are cases "where basing a decision on both federal and state constitutional grounds may be entirely appropriate," but concluded "that this is not such a case." (Pet. App. 33)

4. Judge Titone also agreed that summary judgement dismissing the complaint was proper. However, while sharing the concerns of Judges Simons and Hancock about deciding the case as a matter of both federal and state law, Judge Titone concluded

that the case should not be decided on federal grounds, but should instead be dismissed on the sole ground of the New York common law fair comment doctrine. (Pet. App. 27-32)[6]

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[6] Immuno A.G. devotes over a page of its petition to a string citation of newspaper reports on this case (Pet. 14-15 n. 12). More to the point are its real-life effects, as described in Dr. Moor-Jankowski's letter to the editor of *The New York Times*, entitled "View from Inside a Landmark Libel Case" and published January 25, 1991:

> In your report that New York State's highest court has ruled that letters to the editor and other forms of commentary deserve protection from libel suits (news article, Jan. 16), you discuss the discrepancy in the approaches of the United States Supreme Court and the Court of Appeals to the legal standards for libel. I am the "victorious" defendant in this case and write to point out the real-life effects of this suit.
>
> I am a full-time research professor at the New York University School of Medicine and the unpaid editor of the small, international Journal of Medical Primatology. For the last seven years (10 percent of the life expectancy of the average American male) I have been sued by the multinational Austrian pharmaceutical company Immuno Aktiengesellschaft. So far, my legal expenses exceed $1 million.
>
> I underwent 14 days of depositions over a year and a half in this country and was ordered by the lower court to participate in extremely costly depositions in Austria and Sierra Leone, Africa. No wonder that I am the only remaining defendant. In the words of the Appellate Division, First Department, Immuno Aktiensgesellschaft "succeeded in coercing what the motion court referred to in its decision as 'substantial settlements' from all but one of the original defendants for the obvious reason that costs of continuing to defend the action were prohibitive." [Pet. App. 72] In one case, the insurance company settled against the protest of the author of the letter I published.
>
> This is, I believe, the first case where a commercial company sued a scientific journal for debate of an environmental issue, the use of wild chimpanzees, an endangered species, for infectious medical studies in Africa. While successive courts of appeal confirmed the letter's facts and that their discussion was protected as opinion, the seven years of proceedings consumed most of my time, curtailing my scientific activities. .

(Footnote continued)

SUMMARY OF ARGUMENT

1. Immuno A.G. fails to raise a substantial federal question in its arguments attacking the conclusion of Judge Kaye's majority opinion and the concurring opinions of Judges Simons and Hancock that the Letter to the Editor is constitutionally protected under *Milkovich v. Lorain Journal Co.*, 497 U.S. ____, 110 S. Ct. 2695 (1990).

2. The issuance of a writ of certorari in this case is not proper under *Michigan v. Long*, 463 U.S. 1032 (1983), because the New York Court of Appeals expressly granted summary judgment on a bona fide separate, adequate and independent state constitutional ground. Immuno A.G.'s arguments for avoiding *Michigan v. Long* are without merit and reflect an unprecedented and unwise disrespect for state constitutions and state law in a federalist system.

ARGUMENT

I. IMMUNO A.G. FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN ATTACKING THE CONCLUSION OF THE NEW YORK COURT OF APPEALS THAT THE LETTER TO THE EDITOR WAS CONSTITUTIONALLY PROTECTED UNDER *MILKOVICH V. LORAIN JOURNAL CO.*

A. *The Court of Appeals Majority Cautiously Stated And Applied Milkovich v. Lorain Journal Co.*

The majority opinion cautiously stated its understanding of *Milkovich*:

> Thus, if not alone from the Supreme Court's statement of the governing rules, then from its application of those rules

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The court victory may still not effectively protect me or other editors of small professional journals from the chilling effect of suits by wealthy corporations using our legal system to discourage criticism of their activities. We need a legal deterrent to prohibitively costly, meritless libel suits that misuse the court system to undermine our First Amendment rights.

(p. A28) Dr. Moor-Jankowski has had similar Letters ot the Editor published in *The Wall Street Journal*, p. A9 (March 1, 1991) and *The New York Law Journal*, p. 2 (Jan. 31, 1991).

> to the facts of *Milkovich*, it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable.

(Pet. App. 7)[7]

The Court majority then applied *Milkovich*. After noting that on the original appeal, a unanimous Court of Appeals had concluded that "the factual review undertaken by the Appellate Division established that plaintiff had raised no triable issue as to the falsity of the threshold factual assertions of the McGreal letter" (Pet. App. 8), the Court majority stated: "We continue to believe that the Appellate Division review, to the extent it identified assertions of fact and concluded that such assertions had not been shown to be false, established that no triable issue of fact existed." (Pet. App. 8).

To "illustrate the enduring soundness of that analysis," the Court majority specifically applied *Milkovich* to what Immuno A.G. had on remand called the "core libel," or "core premise," or "core factual statement" of the McGreal Letter – namely, that "[r]elease of chimpanzee 'veterans' of hepatitis non-A/non-B research would be hazardous to wild populations, as there is no way to determine that an animal is definitely not a carrier of the disease". Judge Kaye's opinion on this point follows:

> Applying *Milkovich*, we discern two assertions of fact, one express and one implied. First, the statement asserts that there is no scientific method for determining if a chimpanzee

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[7] Immuno A.G. asserts (Pet.9) that the New York Court of Appeals heard the second oral argument "apparently believing that *Milkovich* was just saying, 'look, don't apply this *Gertz* dictum with a heavy hand. Just don't apply it willy-nilly, but analyze each case.'" The petition then refers to "A 98 (Hancock, J.)," which discloses that Judge Hancock was *questioning* Immuno A.G.'s counsel about the meaning of *Milkovich*, not stating what his six colleagues "believed" *Milkovich* was "saying". In fact, the differences between the discussions of *Milkovich* in Judge Hancock's concurring opinion and the majority opinion show that his question did *not* reflect what at least four of his colleagues believed.

exposed to the non-A/non-B virus is not a carrier of the disease. Second, the statement implies that plaintiff will release possible carrier-chimpanzees who may endanger the wild population . . . .

As for the express assertion of the absence of a test, plaintiff has pointed us to no proof establishing a scientific test in the relevant period that could conclusively determine the carrier state in chimpanzees or, more specifically, could definitely rule out that a veteran chimpanzee was not a carrier of the virus. When considered against the extensive record, plaintiff's effort to establish that there was a fail-proof test, by weaving together isolated fragments of the testimony of various experts (including defendant), simply does not satisfy its legal burden.

To the contrary, what is apparent from the record is that in the relevant period there was an ongoing process of discovery and debate centering on the very existence of a carrier state of the virus, all of which was made even more inconclusive by ambiguity as to precisely when relevant technology was acquired. When asked if it was possible that the test for detecting the carrier state would yield negative results even though the chimpanzee carried the virus, plaintiff's Dr. Johann Eibl replied "[t]here is no proof on that." Finally, even if the express assertion of the "core premise" had been shown to be false, that assertion would not itself libel plaintiff, because it does not "stat[e] actual facts' about [that] individual." (*Milkovich v. Lorain Journal Co.*, 497 U.S. at ____, 110 S.Ct. at 2706, supra; *see also King Prods. v. Douglas*, 742 F.Supp. 778, 784 [SDNY]).

Similarly, as the Appellate Division concluded, there was no proof of falsity of the implied assertion of fact — that plaintiff in the relevant period planned to release chimpanzees with no means of definitely determining that they were not carriers of the disease, thus endangering the wild populations. It is clear from the record that plaintiff, in 1983, was considering the option of rehabilitating chimpanzees used at the projected Sierra Leone facility, for return to a

> natural state (*see*, 145 A.D.2d, at 136). With no proof of the falsity of the express assertion that there was a conclusive test of carrier status available in 1983, it follows that there was also no proof of the falsity of the implied assertion that plaintiff planned to return its veteran test animals with no means of definitely determining that they were not hepatitis carriers.

(Pet. App. 8-10) The Court also considered "[a]s an additional matter," the Appellate Division's findings concerning the lack of any practical test for determining infectiousness (as opposed to the carrier status). (Pet. App. 10)

B. *Immuno A.G. Does Not Raise A Federal Question Concerning The Reading By The New York State Appellate Courts Of The Letter To The Editor.*

To avoid the conclusion that summary judgment is proper under *Milkovich*, Immuno A.G. does not quote the Letter to the Editor from which any "implications" are to be derived, but complains that the Court of Appeals, because it did not find false defamatory implications, "misconstrued and trivialized" *Milkovich*. (Pet. App. 17-18) This complaint does not raise a substantial federal question.

What implications of fact may be drawn from an express statement, and whether any such implications are defamatory, are initially issues of *state* law. (*See* p. 25, *infra*.) In New York, there is a developed body of libel law on (a) whether a statement may be implied from a publication, *Cohn v. NBC*, 50 N.Y.2d 855, 887, 408 N.E.2d 672, 673, 430 N.Y.S.2d 265 (published language must be given a fair reading and courts not to strain to find untenable defamatory interpretations), *cert. denied*, 449 U.S. 1022 (1980); and (b) if it may, whether such statement may be found defamatory, *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94, 483 N.E.2d 1138, 1139, 493 N.Y.S.2d 1006, 1007 (1985) (issue of law for the Court to determine whether there is a reasonable basis for drawing a defamatory meaning from a statement).

The *federal* constitutional issue is whether implications permissible under the states' libel laws are in conflict with the First Amendment. *Milkovich* ruled that, as a matter of federal constitutional

law, Ohio (a) "could conclude" that the complained of article contained an implied defamatory accusation of perjury, and (b) if it did, could subject the implied defamatory statement to Ohio libel law. *Milkovich* did not require Ohio, as a matter of federal constitutional law (or as a matter of Ohio libel law), to find an implied charge of perjury. Put somewhat differently, the First Amendment does not *require* the states to find implications that, as a matter of state law, are not present.

It therefore follows that in this case, nothing in *Milkovich requires* New York to find any implication in the Letter to the Editor that the Court of Appeals did not determine was present.[8]

C. *Immuno A.G. Does Not Raise A Federal Question Concerning The Correct Determination Of The New York State Appellate Courts That There Is No Triable Issue Of Falsity.*

Also to avoid the conclusion that summary judgment is proper under *Milkovich*, Immuno A.G. complains that the New York Appellate Division and Court of Appeals erred in concluding that there is "no triable issue of falsity" (the summary judgment standard under the New York CPLR 3212). Again, however, Immuno A.G. fails to raise a "substantial federal question." Falsity is an element of the state law cause of action for libel, and it is with regard to that element Immuno A.G.'s proof failed on summary judgment under the New York CPLR 3212. Accordingly, Immuno A.G.'s request for this Court to review the record on proof of falsity is wholly without merit for three reasons.

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[8] Immuno A.G. cites Judge Simons, responding to footnote 3 in the majority opinion, that if there were a defamatory implication from the Letter to the Editor under *Milkovich*, the Court majority should identify it. (Pet. App. 17-18) Immuno A.G. ignores that the Court majority and Judge Simons both agreed that summary judgment was proper under *Milkovich* and that Immuno A.G.'s argument on remand failed to show to either the Court majority or to Judge Simons that there were any such false defamatory implications.

1. This Is An Appropriate Case For This Court To Defer To The State Court Review of the Record.

The customary rule for this Court is to defer to state court determinations of fact based on the state court's examination of the record. *See, e.g., Pennekamp v. Florida*, 325 U.S 331, 345 (1946) ("we are accustomed to adopt the result of the state court's examination"); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976) (Rehnquist, J.) ("Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference . . ."). Not applicable here is the review required by *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), because those precedents establish that "in cases raising First Amendment issues, an appellate court has an obligation to 'make an independent examination of the whole record' *in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'* " (emphasis supplied). Here, the New York Court of Appeals decision, upholding summary judgment dismissing the libel complaint, does not present any risk of a judgment constituting a forbidden intrusion on the field of free expression. In fact, Immuno A.G. seeks to turn *New York Times v. Sullivan* on its head and have this Court (a) independently examine the record *de novo* to review the determinations of the New York State appellate courts (which themselves made an independent examination of the whole record), and (b) reverse the state court appellate courts' judgment that the corporate plaintiff does not have a *state* common law cause of action. There is no federal interest in this case justifying this Court to engage in such review.

2. The Ordinary Rules Of Summary Judgment In New York Were Applied.

This case involves the application of the ordinary rules of summary judgment in New York, which provide that a party opposing a properly made summary judgment motion cannot rest on the conclusory allegations of the complaint, but must come forward with competent proof creating "triable issues of

fact." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 598 (1980); *Alvord & Swift v. Steward M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82, 385 N.E.2d 1238, 1240-41, 413 N.Y.S.2d 309, 311-12 (1978). Similarly, federal law imposes the burden on a party opposing a properly made summary judgment motion to come forward with competent evidence, and not rest on conclusory statements, with respect to an issue as to which the party bears the burden of proof (as Immuno A.G. does here on falsity). *Celetex Corp. v. Catrett*, 477 U.S. 317 (1986); *Fontenot v. Upjohn*, 780 F.2d 1190, 1195-96 (5th Cir. 1986). Summary judgment was properly granted in this case because, as determined by the New York State appellate courts, Immuno A.G. simply did not have proof creating "triable issues" under the New York CPLR 3212 – or what presumably would be discussed as "genuine issues of material fact" under federal law. To use the Appellate Division's words, Immuno A.G.'s case was "ill-focused" (Pet. App. 87). Consequently, contrary to Immuno A.G.'s argument (Pet. 20-21), the granting of summary judgment here is consistent with *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), where this Court *reversed* the denial of summary judgment in a libel case, stating:

> . . . the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is there be no genuine issue of material fact.
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> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-248.

3. The New York Appellate Courts Correctly Treated The Record.

If this Court were to depart from its customary practice of deferring to state court determinations of fact in the absence of

federal constitutional interest and instead duplicate the work of the New York appellate courts, this Court would see for itself that Immuno A.G.'s arguments have been thoroughly dealt with and properly rejected by the New York appellate courts.

(a) The "Core Premise".

Contrary to Immuno A.G.'s argument (Pet. 21), the New York appellate courts, in upholding summary judgment dismissing the complaint, determined that a reasonable factfinder could not find falsity with respect to the statement that "[r]elease of chimpanzee veterans of hepatitis non-A non-B research would be hazardous to wild populations, *as there is no way to determine that an animal is definitely not a carrier of the disease*." (Pet. App. 151; emphasis supplied)

The Appellate Division stated:

> It is quite clear that Dr. McGreal was correct in her observation that there is no way of definitely determining whether an animal is a non-A/non-B carrier. Dr. Alfred Prince, the discoverer of non-A/non-B hepatitis and widely regarded as the preeminent authority on that form of hepatitis, . . . expressly confirmed that, as Dr. McGreal had stated, there is no test to identify the viral agent which causes non-A/non-B hepatitis, and indeed Immuno's own Dr. Eder co-authored an article acknowledging that the virus lacks generally accepted serological and morphological markers (4 Hepatology Magazine 510 [1984]). There is then no real issue as to the accuracy of the factual premise underlying McGreal's concern that undetected non-A/non-B carriers might be released.

(Pet. App. 84) Indeed, Immuno A.G.'s counsel, referring to the McGreal statement "there is no way to determine that an animal is definitely not a carrier of the disease", admitted in his last oral argument to the Court of Appeals: "That is not a misstatement of fact. There is no way to determine if an animal is a carrier." (Pet. App. 97)

Having conceded there is no test of the carrier state, Immuno A.G. argues in its petition that there is nevertheless a procedure

for determining "infectiousness" (Pet 6). That argument, however, had been rejected by the New York Appellate Division (Pet. App. 84-85) and was rejected again on remand by the New York Court of Appeals:

> As an additional matter, the Appellate Division considered infectiousness as well as carrier status (the "core premise" refers only to carriers [see, 145 AD2d, at 139]). Although there was testimony that infectiousness might be tested by inoculating a healthy chimpanzee with the blood of a potentially infected animal to see whether the healthy animal developed hepatitis symptoms, plaintiff produced no proof that it would in fact be implementing that procedure at its facility. That procedure was described by Dr. Alfred Prince, a leading expert, as "expensive," "laborious" and "wasteful," in that it involved the deliberate infection of healthy chimpanzees to test the infectiousness of animals that had been exposed to the virus. As the Appellate Division noted, "McGreal can hardly be faulted for not assuming that Immuno would necessarily perform the inoculation procedure on every one of the many chimps it intended to return to the wild." (145 AD2d, at 140)

(Pet. App. 10)

Now, in this Court, Immuno A.G. again claims that Dr. Moor-Jankowski knew "how to tell that chimpanzees exposed to hepatitis non-A/non-B were infectious" (Pet. 5, 16, 21), and that his "sworn testimony . . . proved the falsity of the libel." (Pet. 16) Dr. Moor-Jankowski's testimony, however, did no such thing. The testimony of Dr. Moor-Jankowski establishes: (1) that it was *not* possible to determine that a chimpanzee exposed to hepatitis non-A/non-B definitely is *not* a carrier—which is the statement made in the McGreal Letter—but it was possible, based on the test history of laboratory animals, to presume that a chimpanzee exposed to hepatitis non-A/non-B *is* a carrier (Resp. App. 14); and (2) that an inoculation procedure could be used to identify infectiousness. A presumption that a chimpanzee is a carrier does not contradict the statement "there is no way to determine definitely that an animal is not a carrier of the disease." An inoculation procedure, which

involves the injection of a healthy chimpanzee with the serum of a chimpanzee exposed to hepatits non-A/non-B, is not a test "to identify the viral agent which causes non-A/non-B hepatitis" (Pet. App. 84) and is neither "fool-proof" (Pet. App. 9) nor practical for the purpose of screening the possible annual release of 60 to 80 chimpanzee veterans of hepatitis non-A/non-B research. (*See* Pet. App. 10, 84-85, 106-108; Resp. App. 11)

(b) Events Prior To Publication.

Immuno A.G. also misstates events that occurred before Dr. Moor-Jankowski published the McGreal Letter to the Editor. For example:

First, Immuno A.G. repeats its argument that Dr. Moor-Jankowski deliberately incited Dr. McGreal to write the Letter to the Editor (Pet. 15), even though the Court of Appeals rejected that contention *three* times (Pet. App. 43, 90, 4). The record, summarized by the New York Appellate Division and Court of Appeals, makes clear that the Letter was "provoked by a particular state of affairs" (Pet. App. 42); and that state of affairs included (a) the CITES treaty, which restricts the transnational movement of endangered species such as chimpanzees and was ratified by Austria in April 1982, and (b) the August 23, 1982 document by Klaus Bieber, Immuno A.G.'s representative in Sierra Leone, which describes the Immuno A.G. proposal for a Sierra Leone research facility using captured chimpanzees. (Pet. App. 74-75) The Letter to the Editor criticizes the proposal reflected in the Bieber document, and one of the Letter's criticisms is that the proposal is a way of "getting round [CITES] restrictions on the international movement of chimpanzees" (*see* p. 3, *supra*).

Second, Immuno A.G. complains that Dr. Moor-Jankowski allowed the Letter's comment that "readers familiar with the destructive method by which chimpanzees are caught (killing of mothers in most cases) may be surprised" by the August 23, 1982 Bieber statement that Immuno A.G.'s proposal would not adversely impact the numbers of wild champanzees. *(See* p. 4, *supra.)* On this point, the Appellate Division dispositively determined that "It has not been seriously disputed in the course of this litigation

that, as Dr. McGreal stated, chimpanzees are most often caught by killing their mothers, and it has been estimated that for every juvenile chimps captured, 5 to 10 mothers are killed." (Pet. App. 83)[9]

Third, Immuno A.G. ignores the facts concerning the opportunity to reply to the Letter, which Dr. Moor-Jankowski twice afforded the company and which the Appellate Division observed, "was made extraordinarily available to [the company]." (Pet. App. 82) The significance of this omission is evident in light of the Appellate Division's discussion of these facts (the "first remedy" under *Gertz v. Robert Welch, Inc.*) (Pet. App. 82-3); and Judge Kaye's references to those reply opportunities in her opinion for a unanimous Court of Appeals ("rebuttal openly invited") (Pet. App. 43); and, on remand, for the majority of the Court ("rebuttal openly invited") (Pet. App. 19).

Fourth, Immuno A.G. incorrectly asserts that Dr. Moor-Jankowski "deliberately ignored conflicting evidence" that Immuno A.G. agreed not to try to release "used" chimpanzees back to the wild and to establish a breeding facility. (Pet. 6) The Appellate Division rejected this assertion (Pet. App. 80). Dr. Moor-Jankowski did review the documents in question, but concluded that they confirmed the situation described in the McGreal Letter to the Editor (Resp. App. 15-17)[10] and that Immuno A.G. could not

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[9] Immuno A.G. has asserted, based on pre-1982 correspondence, that Dr. Moor-Jankowski knew that Immuno A.G.'s source of chimpanzees, Franz Sitter, obtained chimpanzees without employing destructive methods (Pet. 5). Not only is the assertion irrelevant, but also the record shows that prior to the publication of the Letter, Dr. Moor-Jankowski had come to the conclusion that Sitter was using destructive means to capture chimpanzees. (Resp. App. 12-13)

[10] For example, Dr. Abass Bundu, the Sierra Leone Minister of Agriculture, reported in a memorandum that "the main reason why" Immuno A.G. was proposing the facility was that the company "would not otherwise be able to import chimpanzees into Austria by virtue of the Washington Agreement [the CITES Treaty] . . . to which Sierra Leone and Austria are both signatories." (Pet. App. 76, 164-165) Also, the Bundu memorandum stated that Immuno A.G.'s proposal to rehabilitate the chimpanzees after testing and to return them back to the wild was not sound for reasons similar to those stated in the McGreal Letter, including "a risk of transmission of viruses acquired during the experimentation" (Pet. App. 76, 166).

proceed with the suggested captive breeding, as to which *Die Presse* had already quoted Immuno A.G.'s director Dr. Eibl as presenting "unsurmountable difficulties". (Pet. App. 80-81; Resp. App. 15-17)[11]

II. CERTIORARI IS NOT PROPER UNDER *MICHIGAN v. LONG.*

A. *This Case Involves A Clear Application Of Michigan v. Long.*

In *Michigan v. Long*, *supra*, 463 U.S. at 1040-41, this Court stated the standard for considering whether to issue a writ of certiorari that is applicable in this case:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground . . . . If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached . . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

With this direction, Judge Kaye's opinion for the New York Court of Appeals majority carefully complied in a number of ways: (1) Judge Kaye expressly states at four points that the Court majority is deciding the case on *independent* state constitutional grounds (Pet. App. 2, 11, 13-14, 16); (2) Judge Kaye discusses the

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[11] Indeed, Immuno A.G.'s argument about "conflicting evidence" is not consistent with its own admissions: the only decision made by Dr. Eibl of Immuno A.G. following the meeting between Immuno A.G.'s employee, Dr. Eder, and Sierra Leone government officials in April 1983, was to apply for permits for an importation of chimpanzees from Sierra Leone to Austria, *not* to proceed with breeding (Resp. App. 18), and Dr. Eibl's testimony makes it clear that taking chimpanzees from the wild for use in research and releasing "used" chimpanzees back to the wild continued to be part of Immuno A.G.'s desired plan (Resp. App. 19-20).

state constitutional values at stake and concludes that the state constitutional decision is in accordance with state constitutional core values (Pet. App. 11-12); (3) Judge Kaye expressly states that the reference to federal cases in the state law analysis is for "the purpose of guidance only" and does not compel the result (Pet. App. 13); (4) Judge Kaye expressly discusses the reasons for a separate and independent state law analysis: (a) New York's "own exceptional history and rich tradition" in its State Constitution and common law concerning the liberty of the press, (b) the responsibility of the Court of Appeals to settle the law of New York, particularly since (in the majority's view) under *Milkovich*, insufficient protection may be accorded to core values protected by the New York Constitution, and (c) the pointlessness of deferring state law review (Pet. App. 14); and (5) Judge Kaye provides a separate state law analysis (Pet. App. 16-20). It follows that under *Michigan v. Long* certiorari is not proper in this case.

B. *Immuno A.G.'s Arguments To Avoid Application Of Michigan v. Long Are Meritless.*

In an attempt to avoid the clear application of *Michigan v. Long*, Immuno A.G. makes six arguments. Not one has merit.

1. Immuno A.G. falsely asserts that the Court of Appeals majority has "disguised" a federal constitutional determination as a matter of state constitutional law. (Pet. 12) When the Court of Appeals originally decided the case, it held that the Letter to the Editor was privileged opinion under both the Federal *and State* Constitutions (Pet. App. 38, 43) and treated the opinion privilege as the successor to the state common law fair comment doctrine (Pet. App. 38-39, 43). On remand, for "further consideration in light of *Milkovich*," the majority not only upheld summary judgment under *Milkovich* (because there was no triable issue of falsity), but also independently adhered to its original state constitutional decision on the basis of New York State constitutional concerns and values:

> It has long been recognized that matters of free expression in books, movies, and the arts generally, are particularly suited to resolution as a matter of State common law and

> State constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation, and the State courts supplementing those standards to meet local needs and expectations . . . .
>
> [New York] State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas . . . . That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish . . . sentiments on all subjects." (N.Y. Const., art 1, § 8). . . .
>
> Thus, . . . the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution. . . .

(Pet. App. 11-12) The Court of Appeals accordingly affirmed its original state constitutional decision because it was in accordance with core values protected by the State Constitution (Pet. App. 12-13, 16-20). Indeed, the majority opinion could be described as stating New York's current state constitutional fair comment doctrine.[12]

2. Immuno A.G. mistakenly asserts, without citation of any authority, that the New York Court of Appeals "exceeded" the scope of the remand in deciding the case on independent state constitutional grounds (Pet. i, 9). What the remand order required was "further consideration in light of *Milkovich*"; it did not dictate how *Milkovich* was to be considered. The majority complied by considering *Milkovich* at length and concluding (a) that summary judgment was mandated under the mode of analysis indicated

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[12] The reliance by the Court of Appeals on the state constitutional free speech guaranty in this context is not novel. To the contrary, a leading state common law fair comment case, *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), contained an extensive discussion of the Kansas State Constitution's free speech guaranty, as well as a consideration of the adverse effects of libel litigation on free expression.

in *Milkovich*, and (b) that summary judgment was separately and independently mandated under its original state constitutional analysis and decision. The majority thus acted consistently with the terms of the remand order. *People v. Duncan*, 124 Ill.2d 400, 530 N.E.2d 423 (1988); *Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986); Hellman, "Granted, Vacated and Remanded - Shedding Light On A Dark Corner Of Supreme Court Practice," 67 Judicature 389 (1984).

3. Immuno A.G. is also mistaken in asserting that ever since *New York Times v. Sullivan*, 376 U.S. 254 (1964), "the U.S. Supreme Court has set *national* policy in the development of defamation law." (Pet. 12; emphasis in the original) There is no general federal law of libel. *See Erie Railroad Co. v. Tompkins*, 340 U.S. 64 (1938) (Brandeis, J.). The legal remedy for protection of reputation is entrusted to the states, *see Paul v. Davis*, 424 U.S. 693 (1976) (Rehnquist, J.); defamation has always been, and continues to be, a *state* law cause of action, in existence because of state legislative reception of such common law (*see* James Madison, "The Virginia Report of 1799-1800," *reprinted in The Mind of the Founder*, M. Meyers ed., pp. 245-46 (rev. ed. 1981)), and subject, as is all state law, to state constitutional law. What this Court has done ever since *New York Times v. Sullivan* is to articulate constitutional limits on the states' libel laws, not to dictate the development of the states' libel laws within those limits. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (states to set standard of liability for public concern/private figure cases so long as not strict liability). Furthermore, these federal constitutional restrictions on the states' libel laws do not foreclose the state courts from applying additional state constitutional (and common law) restrictions on their own state law cause of action to safeguard freedom of expression. *See Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-558, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986). *See* Note, "Developments In The Law - The Interpretation of State Constitutional Rights," 95 Harv.L.Rev. 1324 (1982).

4. Immuno A.G. also wrongly claims that the Court of Appeals "misused" *Michigan v. Long* "to ward off" U.S. Supreme Court review, thereby risking the subordination of federal interests to

state interests. (Pet. 13) As defamation is a state law cause of action, Immuno A.G. cannot sensibly complain about an independent state determination in the absence of a defined federal interest and also ignore the state court's extensive discussion of state law interests protecting free expression. (Pet. App. 11-14)[13]

5. Immuno A.G. further argues that "the next step after *Michigan v. Long* ought to be a holding that this Court has jurisdiction to review state court decisions which are *prima facie* grounded on state law, but which are to a certain degree interwoven with or derived from federal jurisprudence." (Pet. 13) This proposal, however, is in substance *not* one to extend or even to modify *Michigan v. Long*; it is a proposal to overrule *Michigan v. Long*. It would call upon this Court to disregard the bona fide express statement of the Court of Appeals made in response to *Michigan v. Long* – that the decision is based on independent state constitutional grounds and the citation of federal precedent is for guidance only and does not compel the result.

6. Immuno A.G. also erroneously claims that the "independent state ground" articulated in Part III of the majority opinion is "a pure invention" because it is founded on this Court's decision in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). (Pet. 16-17) Nowhere is *Hepps* cited or applied in Part III of the majority opinion, which discusses the majority's separate, adequate and independent state constitutional ground of decision. In fact, the only place where *Hepps* is cited in the majority opinion is in Part II containing its federal law discussion, at which point the Court of Appeals majority also cites its own New York precedent for the libel plaintiff's burden of proving falsity, *Silsdorf v. Levine*, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 464 U.S.

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[13] Instead, Immuno A.G. charges the New York Court of Appeals with "glibly saying that Immuno should not consider 'any trip to Washington'". (Pet. 15) What the Court of Appeals majority stated was "In view of the costly, sizable record already amassed, including hundreds of pages of briefs, no purpose is served by compelling *these* parties, on *this* record and *these* briefs, to consider another trip to Washington, with the prospect that State law review before this Court would ultimately be available" (Pet. App. 14; emphasis in the original and footnote omitted).

831 (1983), and *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986) (*see* Pet. App. 8). Furthermore, even if the libel plaintiff's burden of proving falsity under state law had in theory originated in *Hepps*, the Court of Appeals majority expressly states that in the "state law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result" (Pet. App. 13).

C. *Immuno A.G.'s Argument That Certiorari Should Be Issued To Stop A "Judicial Stampede" Away From Milkovich Is In Substance An Unprecedented And Unwise Attack On State Constitutions And State Law In A Federalist System.*

Immuno A.G. further argues that this Court should grant certiorari in order to prevent "a judicial stampede" away from *Milkovich*, which petitioner says will result from the decision of the Court of Appeals in this case. (Pet. 18-22) Immuno A.G. may well be presuming an understanding of *Milkovich* that this Court did not intend, but in any event, Immuno A.G. is asking this Court to disallow, in an unprecedented and unwise manner, the separate and independent application of a state's constitution and a state's laws.

1. Immuno A.G. first criticizes the reasoning of the New York Court of Appeals under the New York Constitution:

> The Court of Appeals majority ignored the teaching of *Milkovich* as to the role of context. It held that one reason the *state* constitution protected the libel letter was *context*.

(Pet. 18; emphasis in the original) Thus, Immuno A.G. is apparently claiming that in the absence of any defined federal right, this Court can tell the New York Court of Appeals how to interpret the New York State Constitution (and also to disregard to the consideration of a publication's context required under New York common law). This Court, however, does not review state court interpretations of state law in such situations. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Scripto, Inc. v. Carson*,

362 U.S. 207, 210 (1960); *Winters v. New York*, 333 U.S. 507, 514 (1948); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

2. Immuno A.G. follows its complaint about independant state constitutional decision-making with a *non sequitur* designed to disallow appropriate state appellate law review (even though petitioner is suing on a state common law claim):

> This Court should grant *certiorari* once more in this case, announce its jurisdiction to review independent state grounds to the extent interwoven with federal law, and send this case directly to the trial judge for a trial.

(Pet. App. 19-20) Obviously, "independent state grounds" are by definition *not* "interwoven with federal law" and under *Michigan v. Long not* appropriate for review. Furthermore, this Court's practice has been, consistent with due respect given to state courts in a federalist system, to remand the case to the state appellate court whose decision is under review for proceedings not inconsistent with this Court's opinion. *See e.g., New York Times v. Sullivan*, *supra*, 376 U.S. at 292; *Milkovich*, *supra*, 110 S. Ct. at 2708. This practice is especially appropriate here, where a state's highest court has already held that a state law action should be dismissed under the state's provisions for summary judgment on independent state constitutional law grounds and that such state grounds are separate and independent of federal law (Pet. App. 11-16).[14]

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[14] In addition, the state appellate process should not be bypassed (a) because as shown in Judge Titone's concurring opinion, the Letter is privileged under the New York common law doctrine of fair comment and the Court of Appeals should be free to determine this matter, and (b) because, as shown in Part III of Dr. Moor-Jankowski's brief on remand to the New York Court of Appeals, there are alternative grounds for dismissing this case which have not been necessary to reach but which are also dispositive: (i) there was no defamation as a matter of state law; (ii) there was no "actual malice" as a matter of federal law or "gross irresponsibility" as a matter of state law – the opportunity given to Immuno A.G. to reply to the Letter and the existence of confirming documents and press articles would seem to render absurd Immuno A.G.'s argument about culpable falsity; and (iii) there were no actual pecuniary damages, which a corporate plaintiff must have in order to proceed with a libel cause of action in New York and elsewhere, *see* Second Restatement of Torts § 561, and must establish in order to satisfy *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

3. Immuno A.G. finally asserts that certiorari should be granted in this case in order to provide guidance as to the treatment of the burden of proof of falsity under *Hepps* in the context of a summary judgment motion. (Pet. 20-22) The request is misconceived because guidance already exists (*see* p. 17, *supra*) and the Court of Appeals majority has made it clear that federal cases such as *Hepps* are not controlling (Pet. App. 13). Given the precedents of the Court of Appeals on point, *see* pp. 26-27, *supra*, the libel plaintiff's burden of proving falsity in New York must be considered independent of *Hepps*.

CONCLUSION

Immuno A.G.'s petition is without merit because (1) it does not present a federal question requiring this Court's attention, and (2) the case has been decided on bona fide separate, adequate and independent state constitutional grounds. In this 200th year of the First Amendment (written by James Madison) and this 170th year of the current New York Constitution's free speech guaranty (inspired by Alexander Hamilton), it is time for this case to end.

Dated: May 10, 1991

Respectfully submitted,

PHILIP A. BYLER
Counsel of Record and Attorney for Respondent Dr. Moor-Jankowski

Of Counsel:

LOUIS LAUER

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APPENDIX

A. *Constitutional And Statutory Provisions.*

Article III, section 2, clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law.

Title 28 of the United States Code, section 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question ont he ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Article I, Section 8 of the New York State Constitution provides in pertinent part:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of

> that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . .

Section 3212 of the New York Civil Practice Law and Rules ("CPLR") provides in pertinent part:

> A motion for summary judgment . . . shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.

B. *Dr. Jan Moor-Jankowski's Curriculum Vitae (A 4035-37).*

CURRICULUM VITAE

JAN MOOR-JANKOWSKI

Born:	5th February, 1924, Poland U.S.A. Citizen, naturalized 1963 WWII Polish Home Army (Underground): disabled war veteran
Education:	
1945	Matriculated at Fribourg University Medical School, Switzerland
1954	M.D. Berne University Medical School, Switzerland
Honors:	
1956	Geneva University Prize "Prix Arthur de Člaparde" for research work on demography and population genetics of Swiss mountain populations.
1971	Trumpeldor medal, Prime Minister's Office, Life Sciences Division, Israel for consultations on developing new research programs.
1978	Medal, USSR Academy of Medical Sciences, Institute of Experimental Pathology and Therapy, for consultations on medical use of primate animals.
1979	G. Bude medal, College de France, Paris.
1984	Knight of the French Order "Ordre National du Merite" awarded by the French President for resistance activity in WWII and for scientific achievements.

Major Research Interest:

Experimental medicine; immunology; use of primate animals in research; Conservation.

Research and Professional Experience:

1979-present	Research Collaborator in the Medical Department, Brookhaven National Laboratory, Associated Universities, Inc., Upton, New York 11973.
1980	Lecturer, WHO International Course (2 weeks) on the Utilization of Non-Human Primates in Cancer Research, Sukhumi, U.S.S.R.
1979	Professeur invite, College de France, Paris
1975-present	Director, WHO Collaborating Centre for Haematology of Primate Animals at the Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), New York.
1965-present	Director, Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP), of New York University Medical Center - 50 employees including 5 full-time and 2 part-time faculty members; average 120 collaborating or visiting scientists per year; average annual operating budget $2.5 million.
1965-present	Research Associate Professor, then Professor (since 1969). Department of Forensic Medicine, New York School of Medicine.
1965-1970	Director, LEMSIP division, On-Site at Holloman Air Force Base, New Mexico.

1959-1975	Associate, Seminar on Genetics and Evolution of Man, Columbia University, New York.
1964-1965	Chief, Division of Experimental Immunogenetics and Oncology, Yerkes Regional Primate Research Center of Emory University, Atlanta, Georgia.
1962-1964	Visiting Scientist, Human Genetics Branch, NIDR, NIH, Bethesda, Maryland.
1959-1962	Special Research Fellow of the United States Public Health Service, National Heart and Lung Institute: At Blood Group Research Unit, Lister Institute, London, and at the Department of Pathology, University of Cambridge, England.
1953-1957	Research Associate at the Institute de Genetique Humaine, Medical School of the University, Geneva, Switzerland.
1952-1953	Fellow of the De Giacomi Foundation, Swiss Society of Natural Sciences.

Membership in Professional Societies:

The American Society for Advancement of Science
The American Society of Human Genetics*
The American Association of Immunologists*
American Tissue Culture Society (charter member)
Society for Cryobiology (charter member)
New York State Society for Medical Research
(1965-1973, Director 1970-1973)
The Society for Immunology (British)*
The Swiss Genetic Society
The Swiss Society for Natural Sciences

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* Only candidates with considerable scientific achievement are accepted for membership by the Admission Committee.

The International Primatological Society
The Transplantation Society (charter member)*
International Society for Biological Standardization
Physicians' Scientific Society (limited to 100 members who vote on new admissions)

Publications:

Author of a monograph in human genetics and of more than 200 papers in the fields of human genetics, immunology, medical experimentation in primate animals, and research administration.

1967-1978	Editor, Series "Primates in Medicine", Karger, Basel/New York (10 volumes)
1967-1972	Editor, Proceedings of Conferences on "Experimental Medicine and Surgery in Primates" (Three Conferences, 5 volumes, 3,000 pages).
1968-1973	Advisory Board of "Experimentation animale", Vigor Freres, Paris.
1971-present	Editor-in-Chief, "Journal of Medical Primatology", Karger, Basel/New York. Since 1982 published by Alan R. Liss, Inc., New York.
1983-present	Editorial Board Member "Monographs in Primatology", Alan R. Liss, Inc., New York
1984-present	Special Advisor to the Editor, "American Journal of Primatology", Alan R. Liss, Inc., New York.

Consultancies:

1963-1970	USAF Holloman Air Force Base, White Sands Proving Grounds, New Mexico.

*Only candidates with considerable scientific achievement are accepted for membership by the Admission Committee.

1966-1967	Deutsche Forschumgsgemeinschaft (German Science Foundation) and Volkswagenwerk Stiftung (Volkswagen Foundation) - plans for the German Primate Center.
1967	Bundesgesundheitsministerium (Department of Health, German Federal Republic) and Robert Koch Institute, Berlin, on containment of Marburg virus in monkey colonies.
1969-1974	INSERM (National Institute for Medical Research) and CNRS (National Center for Scientific Research) France.
1969-1979	Chief Medical Examiner, New York City.
1970-1974	National Council for Research and Development, Life Sciences Division, Prime Minister's Office, Israel.
1977-1980	U.S.S.R. Academy of Medical Sciences, Institute of Experimental Pathology and Therapy, Sukhumi, U.S.S.R.
1978 & 1985	Member, NIH Task Force on the Use of and Need for Chimpanzees in Medical Research.
1979	French and Gabon (Africa) authorities, for the Gabon Primate Center.
1978-1979	Pierre Micaux Parliamentary Committee, (France) on Animal Experimentation.
1986-present	Pan American Health Organization, for Peruvian Primate Project Iquitos, Peru.

C. *Excerpts of Testimony on Dr. Shirley McGreal.*

Dr. Jane Goodall, internationally renowned for her research on chimpanzees in the wild (A3938):

> In her capacity as Chairwoman of IPPL, Shirley McGreal has, in my opinion, acted in a responsible and often highly courageous way in pursuit of the goals of IPPL - the conservation of non-human primates in the natural habitat and the humane treatment of non-human primates in captivity throughout the world . . .

Dr. Vernon Reynolds, Oxford University Lecturer in Physical Anthropology and prominent scientist (A3987, A3989-90):

> Dr. Shirley McGreal edits the IPPL Newsletter and contributes articles toward it. I have always been impressed by the high level of accuracy and research involved in this newsletter which I believe gives good coverage of malpractice toward primates . . .
>
> In my personal dealings with Dr. McGreal, I have the highest regard for her dedication and honesty.

Earl B. Baysinger, Chief of the Federal Wildlife Permit Office, United States Department of Interior's Fish and Wildlife Service (A3939, A 3947-48)

> I have known Dr. Shirley McGreal professionally and casually personally for over 15 years. . . . I have found Dr. McGreal and the IPPL to be consistent sources of reliable information of significant value to me and my various offices in carrying out our legally mandated tasks or ensuring the continued survival of all species of wild fauna and flora, including nonhuman primates. . . .
>
> I have never known her deliberately to spread false information nor to engage in what could be considered malicious or libelous acts. While she frequently uses descriptive adjectives and adverbs and has a tendency to vigorously

pursue her points to the chagrin of those who would prefer the points to remain unpursued, I have never found her to go beyond the point of reasonable enquiry.

Dr. Richard Mitchell, Staff Zoologist in the Office of the Scientific Authority under CITES for the United States Fish and Wildlife Service (A3969, A 3971-72):

I have known Dr. Shirley McGreal since 1979 and have exchanged numerous phone calls, letters, and information relating to trade in endangered species of wildlife and the conservation of primates. Shirley has always maintained herself in the utmost professional manner with the interest of the resource foremost. . .

I depend heavily on information furnished by Dr. McGreal to insure that no illegal primates are imported into the United States in violations of CITES and the laws of foreign Nations. My office's scientific findings are documented and are subject to scrutiny by the public. Therefore, I have to be certain beyond doubt that the information that I base my decisions on is accurate and can withstand any legal scrutiny.

I will continue to depend on the confidential information that is provided by Dr. McGreal and the IPPL in order to regulate the trade in endangered species of primates and other wildlife. . . .

Clark R. Bavin, Chief of the Division of Law Enforcement, United States Department of the Interior's Fish and Wildlife Service (A3967-68):

Through the years I have consistently found Ms. McGreal to be a sincere, honest, and an energetic advocate of the cause of primate protection and a valuable source of information to the Service about the activities of persons engaged in both the legal and illegal trafficking of primates. At no time have I ever had cause to believe that Ms. McGreal was providing information that she did not believe to be true and factual.

D. *Letter to the Editor by Dr. Andrew Rowan (A 2512).*

J. Med. Primatol. 13:173 (1984)

Letter to the Editor:

In his letter of March 14, 1984, Dr. Alfred Prince questions the IMMUNO A.G. company's proposal to obtain 60-80 chimpanzees annually from the wild for a proposed hepatitis research center in Sierra Leone. Dr. Prince is correct to raise such concerns, since the indications are that Sierra Leone has only a small native chimpanzee population, that most or all of the wild animals procured for the laboratory are likely to come from neighboring countries, that the West African chimpanzee population is declining at an alarming rate, and that the methods used to capture animals are very wasteful and inhumane.

Dr. Prince also suggests that hepatitis studies should be done on chimpanzees that are already captive or that are bred in captivity. But his own laboratory (Vilab II) in Liberia uses (or accepts) wild-caught chimpanzees as a source of animals for their studies. Furthermore, the Vilab proposals for rehabilitating chimpanzees are not much more realistic than the IMMUNO suggestions. Janice Carter and Stella Brewer have shown how difficult it is to return chimpanzees to the wild successfully, even with constant support and monitoring. Dr. Prince provides no data to suggest that he has found a way to overcome the problems.

Establishing a laboratory in a country where chimpanzees are (or were?) found naturally, as a ploy to avoid the barriers against trade in endangered species, is not an ethical or responsible approach to either conservation or research using chimpanzees.

Andrew N. Rowan, PH.D.
Tufts University School of
Veterinary Medicine
Boston, MA

E. *Excerpt of Dr. Alfred Prince's Deposition (A 1090).*

Q. Do you agree that there is no controversy about an alleged point, that you can exclude the possibility of a carrier state for Non-A, Non-B hepatitis in chimpanzees?

MR. FERSKO: Objection as to form.

A. I think that everyone who is involved in research in Non-A, Non-B with chimps would agree that you cannot exclude whether the animal is infected.

A. I don't think it is controversial among those who work in the area. . . .

F. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 46-48).*

Q. Did you have an understanding that what he [Sitter] was doing was good practice in terms of the way he was capturing chimpanzees up until these people that you say were reliable told you something different?

A. I have to divide it in two points.

Q. Go ahead.

A. I initially was not concerned how the animals were captured. The whole biomedical community was really not very much aware of the animal welfare issue, as you can follow up through the legislation.

I became attuned to it by working with these animals and beginning in 1978 I was getting more and more reports that the methods described by Dr. Sitter do not work.

When Dr. Prince established his laboratory he told me that he would be using the methods by Dr. Sitter, recommended by Dr. Sitter. Actually, he said that he was establishing the operation in Liberia for humanitarian reasons, as reflected on some letters which you have. I was repeating his position, to get animals which were not obtained by killing mothers. He was speaking of setting traps, of shooting the animals with tranquilizer guns. I was skeptical of the tranquilizer guns because I sent three expeditions and they were not able to catch the animals that way. But I thought maybe he had some special method. He was speaking of a South African method. I then found out that it didn't work for Dr. Prince that way, that he had to purchase the animals from native hunters.

Q. When, if ever, did you come to an understanding—

A. Can you repeat the beginning.

Q. When, if ever, did you come to an understanding that Dr. Sitter's capture methods were in any respect other than what Dr. Sitter had been telling you?

A. I think in 1981 and 1982. I don't recall the exact time but around that time.

Q. What did you learn in this period 1981, 1982, that led you to believe that Dr. Sitter's capture methods were not the way he was telling you?

A. The most signal— there were many, but the most signal was a publication by Dr. Prince, who has been many times in Sierra Leone and Liberia, in which he states that the only method or the most prevalent, or the only method, I think he said, of capturing the animals is killing the mothers in Sierra Leone and in Liberia, and for each baby caught, five to ten mothers are killed.

This has been published by the National Institute of Health, in a symposium which was a considerable event devoted to this program, and it was very authoritative.

. . . .

Q. Is there anyone other than Dr. Prince who has given you information which has caused you to disbelieve Dr. Sitter's rendition of his own trapping methods?

A. Yes. Dr. Prince's report really put together all that I was hearing over the years, beginning with my own people who went to Sierra Leone, the reports of Dr. McGrew, Vernon Reynolds, Kortlandt, Harrison, Teleki, to name only a few.

G. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 253-54).*

Q. In 1979, when the NIH animals were taken, were you able to ascertain which animals that had been exposed to N-A, N-B research were carriers?

A. Yes.

Q. Was it your understanding that in 1979 that you could determine whether or not a chimpanzee that had been exposed to N-A, N-B could be infectious?

A. The animals were – for the situation in man, they were considered infectious by NIH. It was infectious animals.

MR. FERSKO: I ask that my question be read back and I would ask if we could focus on the question.

(Question read)

A. That I could determine?

Q. Yes.

A. I knew, I could not determine, but I knew on the basis of history, and in several animals of the enzyme situation, and what investigators told me.

Q. In other words, you were able to determine that some animals, based on their histories and based on the enzyme levels –

A. And the program.

Q. -[1] that some animals that had been exposed to N-A, N-B were not carriers at that point in time and [2] some that were exposed to N-A, N-B were carriers at that point in time?

A. The second part of your statement, not the first.

H. *Excerpt of Dr. Jan Moor-Jankowski's Deposition (A 114-16, 124, 208, 214-15).*

Q. Doctor, did you get any facts during the course of 1983, before you published the article, that led you to believe that maybe what you were publishing in that letter to the editor was not factually correct?

A. Not at all.

Q. Doctor, how about when you got those minutes that we showed you this morning, was there anything in there that led you to believe that maybe what you had wasn't factually correct?

A. I said before it is not, not at all.

. . . .

Q. Doctor, did you receive any information in 1983 that led you to believe that Immuno doesn't want to take 60 to 80 chimpanzee out of the wild but wants to have 50 to 60 chimpanzees to start a breeding colony? Did you see any information like that during the course of the year before you published it?

. . . .

A. I did not receive anything which would contradict what was in Dr. McGreal's letter.

. . . .

Q. Did you consider the fact that you had received a document that said they were going to do breeding and not take 60 to 80 chimpanzees a year from the wild?

A. What is said here on the basis of what I know they could have as well said that they will go to the bakery and they will bake them, new chimpanzees, once a week as much as they need them.

You cannot establish a breeding colony and breed the animals. It takes at least eight years to have a breeding with the animals which you can catch.

. . . .

Q. Since you were trying to give a truthful and complete picture in publishing Shirley McGreal's letter to the editor, don't you think that maybe you should have explained that there were also these minutes that we saw, and that there was also this Bundu letter?

Don't you think that casts a little different light on the project?

A. It doesn't cast a different light on the project to me.

. . . .

Q. The fact is, though, you didn't mention [proposed captive breeding] and don't you think it would have been appropriate to even mention it in that context, even if you wanted to be critical of it?

. . . .

A. I am being all the time told that I wrote the letter. I did not write the letter. The letter by Dr. Shirley McGreal stood as it was and the second wave documents, which wasn't even authenticated by stationery, which did not go with another letter, and even in its text in no way, in my experience, contradicted the first.

. . . .

Q. Did you think that in order to give a true picture of what was going on with respect to the Immuno Sierra Leone project to the readers of the Journal of Medical Primatology, that it would be

appropriate to give them the benefit of the amplification you had received prior to the time of its publication?

. . . .

A. The most important aspect of the situation was that Immuno refused to answer a straightforward question, a letter which I submitted, is true or false, and threatened with lawyers.

This was to me a situation which I just felt I should submit to the readers.

Here something was written. There is a letter which I received. It was not directly rebutted by Immuno but lawyers wrote to me letters in legalese, the essence of which I reproduced in the Journal.

This was my response as the Journal's editor, as I saw it.

I. *Excerpt of Dr. Gerard Eder's Deposition (SA 8-9).*

Q. Doctor, yesterday we talked a lot about your visit to Sierra Leone in April of 1983.

When you returned to Vienna and to Immuno after that visit, were there any decisions made at Immuno concerning the Sierra Leone project?

A. The only decision which we have made when I returned and reported to Dr. Eibl was to apply for an importation of 20 chimpanzees from Sierra Leone.

. . . .

Q. Did there come a time thereafter when Immuno did make a decision on some aspect or the other of the project?

MR. FERSKO: Objection as to form. You can answer.

A. I don't know how many times I have to answer that question again.

It is not made a decision until now, because all these negotiations never were finished.

If you finished a negotiation, you can make a decision. But until now it wasn't made.

I am not the decision-maker in our company. Decisions are made by Dr. Eibl. I only can propose it.

J. *Excerpt of Dr. Johann Eibl's Deposition (A 1506-08).*

Q. With respect to the substance of what the [New Scientist] article [in October 1983] alleges Mr. Teleki wrote, that the starting population of fifty to sixty chimps—that Immuno contemplated a starting population of fifty to sixty chimps; is that true or false?

A. No. It is, insofar not fully true, because I always mention 60 to 80 more. So you could not say it is false.

Q. It errs on the side of too low?

A. Right.

It is on the lower side.

. . . .

Q. Had Immuno claimed that it would be in full production [breeding] within two to three years?

A. No, because what we claimed was that we want to have sixty to eighty chimpanzees for the first year, and this was mainly for tests and not for breeding purposes. So, I mean, insofar as a statement of Teleki, it does not mean anything. But I mean just to cite it. Why not?

Q. Was Immuno plānning to get more chimps in the years following the first year?

A. Right. Right.

Q. How was it planning to obtain those additional chimps?

A. In the same way as obtaining these sixty to eighty chimps, provided that this way would work.

. . . .

Q. So, Immuno was not contemplating breeding the chimpanzees in Sierra Leone at that time?

A. No. I mean the idea was not to start out with the breeding colonies. The idea was for the immediate use, to have chimps available, and then if all these tests are carried out, we would have then three options.

The first option is to use them for a breeding colony.

The second option then was to release them to a park, to an animal park.

The third option was to release them to the wild.

Q. To the wild?

A. Yes, sir.

Q. Immuno was contemplating all three of those options?

A. Certainly.

. . . .

Q. At this point in time had Immuno decided which of the options it was going to adopt?

A. No, but I think all three options are running to a certain extent parallel. . . .